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**IN THE  
COURT OF APPEALS OF INDIANA**

ERIC LUCKHART,  
Appellant-Respondent,

and

NANETTE LUCKHART,  
Appellant-Respondent,

VS.

DELAWARE COUNTY DIVISION OF  
FAMILY & CHILDREN,

Appellee-Petitioner.

[illegible]

No. 18A05-0604-JV-205

APPEAL FROM THE DELAWARE CIRCUIT COURT

The Honorable Richard A. Dailey, Judge

Cause Nos. 18C02-0503-JT-9 & 18C02-0503-JT-10

February 19, 2007

## **MEMORANDUM DECISION – NOT FOR PUBLICATION**

### **MATHIAS, Judge**

In this consolidated appeal, Eric Luckhart (“Father”) and Nanette Luckhart (“Mother”) challenge the termination of their parental rights as to their children, I.L. and A.L. They each raise the following issue: whether sufficient evidence supports the trial court’s termination of their parental rights. We affirm.

### **Facts and Procedural History**

Father and Mother are the natural parents of four children, including I.L., born September 27, 1992, and A.L. born June 2, 1995.<sup>1</sup> In 1999, Mother was convicted of murder and sentenced to sixty-five years. As it now stands, with good time credit and the completion of educational programs, Mother is due to be released from prison in 2037.

On October 21, 2001, Father was arrested for driving while under a lifetime suspension. Shortly thereafter, I.L. and A.L. were determined to be CHINS because neither Mother nor Father were able to care for them because of their incarceration.

Father was released from prison June 2, 2005. As part of the underlying CHINS proceeding, Father was ordered, among other things, to maintain contact with Delaware County Department of Child Services (“DCDCS”), submit to random drug screens, maintain sobriety, enroll in individual and family counseling, maintain stable living conditions, and cooperate with homemaking services.

On March 23, 2005, DCDCS petitioned for the involuntary termination of Father’s and Mother’s rights as to I.L. and A.L. After a series of fact-finding hearings, the trial

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<sup>1</sup> Father’s and Mother’s parental rights as to two older children are not at issue in this appeal.

court issued findings and conclusions terminating Father's and Mother's parental relationship with I.L. and A.L, finding in part:

6. [ ] Becky Brandon, the assigned homemaker, testified that [Father] had a history of refusing to cooperate with her; that he regularly missed appointments and would not follow through with contacting service providers; that he was continually behind on his house and utility payments; and that the size of the home was inadequate to provide for the care of four (4) additional children.

7. [ ] Barbara Hisel[] conducted family therapy, individual therapy for [Father], and supervised family visitations.

8. That Barbara Hisel testified that there was a delay in beginning family therapy due to the inconsistency of [Father]. Once family therapy began, [Father] continually undermined the family therapy sessions by blaming the children for the breakup of the family, by putting his personal needs before the family's needs, by relapsing into drug use and refusing drug screens, and by emotionally lashing out at the children when they describe how his behaviors created an atmosphere of mistrust, anger and fear.

9. [ ] [B]ecause of [Father's] attitude, he was excluded from family therapy until he demonstrated progress in reaching treatment goals and is cooperating with the DCDCS. While family therapy continued without [Father], where Barbara Hisel testified that there was positive progress in addressing the negative behaviors of the children, [Father] did not demonstrate sufficient progress to warrant participation in those sessions.

10. [ ] [D]uring visitations, Barbara Hisel testified that [Father] demonstrated inappropriate behavior, failed to provide guidance, structure and discipline, withheld visits with his children as a form of punishment, and failed to bring food or snacks to the visits as instructed.

11. [ ] Barbara Hisel testified that on February 1, 2005, [Father] tested positive for cocaine and refused to take a drug screen requested by Barbara Hisel on February 17, 2005.

12. [ ] [A]ccording to Barbara Hisel, [s]he made a referral in April, 2005 so that [Father] could get back into drug treatment, but that he failed to act on that referral until August 8, 2005.

13. [ ] [D]ue largely to [Father's] continuing drug use, the treatment plan goals addressed in individual therapy were never successfully addressed.

14. [ ] [D]ue to the instability, continuing drug usage, and immaturity of [Father], Barbara Hisel testified that she thought that it was in the best interest of the children that [Father's] parental rights be terminated.

15. [ ] [F]ormer case manager Nancy Cummins testified that there was a delay in delivery of the services of therapy and homemaker services because of a lack of cooperation by [Father].

16. [ ] [C]urrent case manager Pat Ergle testified that [Father] takes no responsibility for the removal of the children; that he has violated the dispositional orders by testing positive for cocaine; by refusing to take drug screens; by being uncooperative with individual therapy; by not timely contacting service providers to begin reunification services, and by inappropriately confronting the children with information concerning court proceedings.

17. [ ] Pat Ergle testified that [Father] tested positive for cocaine on August 29, 2005, even though he knew that proceedings to terminate his parental rights had already been filed.

18. [ ] [Father] testified that he recently used illegal drugs and was not sure whether if tested the day of the hearing, if his drug screen would be clean.

19. [ ] [Father] testified that he was thinking about getting into a program to address his use of illegal drugs, but had not done so by the time of the hearing.

20. [ ] [Mother] was incarcerated when the children were originally removed from the care of [Father].

\* \* \*

23. [ ] [I.L. and A.L.] will be over the age of eighteen (18) before [Mother] reached her projected release date.

24. [ ] [E]ven though [Mother] is incarcerated in the Indiana Women's Prison she has worked hard to stay active in her children's lives and to participate in a program at the Women's Prison that has allowed her to do the following:

- a. Visit with her children almost every other weekend.
- b. Participate in a summer camp with her children.
- c. Participate in the children's counseling program by telephone.
- d. Write letters to her children on a regular basis.

25. [ ] [S]everal witnesses testified that [Mother] and her children loved each other, and that there was bonding between them.

26. [ ] [S]everal witnesses testified that even though [M]other is working hard to continue her relation with [I.L. and A.L.] and that [I.L. and A.L.] love[] [their] mother [ ] [they] need to have a parent that can be with [them] on a daily basis to provide support and attend to [their] needs.

27. [ ] [I.L. and A.L.] need[] a stable home environment and to be able to separate [themselves] from [ ] [their] current family history and establish [their] own li[ves] and try to be [normal children] with parents that can care and support [them] on a daily basis.

28. [ ] [I.L. and A.L.] [are] young enough that termination of [their] present[] parent/child relationship would provide an[] opportunity for [them] to have a new parent/child relationship giving [them] a stable home environment in which to develop into [mature young adults] with a new identity and new family.

29. [ ] [I.L.] and her sister [A.L.] are currently placed in foster care with James and Monique McQueary who have an interest in adopting the two girls.

30. [ ] James and Monique McQueary are providing [I.L.] and her sister [A.L.] with a stable home environment where they are well adjusted.

31. That the Court Appointed Special Advocate, Dr. Taiping Ho, testified that it was in the child's best interest to provide stability, that [Father] was unwilling to provide that stability, and that [it] would be in the child's best interest to terminate the parent/child relationship herein.

32. [ ] [B]ased on the foregoing; there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied.

33. [ ] [B]ased on the foregoing; there is a reasonable probability that the continuation of the parent/child relationship herein poses a threat to the well being of the child.

34. Termination of the parent/child relationship, with respect to [Father] and [Mother] is in the best interest of the child.

Appellant's App. pp. 86-90; 220-24.<sup>2</sup> Father and Mother now bring this consolidated appeal.

### **Discussion and Decision**

The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005) (citing Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). A parent's interest in the care, custody, and control of his or her children is "perhaps the oldest of the fundamental liberty interests." Id. (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)). However, parental interests are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate parental rights. Id. (citing In re D.D., 804 N.E.2d 258, 265 (Ind. Ct. App.

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<sup>2</sup> The trial court entered separate orders terminating both Mother's and Father's parental rights as to each of their two youngest children. Because the court's findings are identical, we find it unnecessary to repeat the findings for each child.

2004)). Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. Id.

When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility and we may consider only the evidence and reasonable inferences that are most favorable to the judgment. Id. In addition, when reviewing findings of fact and conclusions of law entered in termination cases, we apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. Id. We will set aside the trial court's judgment only if it is clearly erroneous. Id. (citing In re Wardship of B.C., 441 N.E.2d 208, 211 (Ind. 1982)). If the evidence supports the trial court's decision, we must affirm. In re T.F., 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), trans. denied.

To effect the involuntary termination of a parent-child relationship, the DCDCS must establish that:

- (A) one (1) of the following exists:
  - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
  - (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made;
  - (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
- (B) there is a reasonable probability that:
  - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied;
  - or

- (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interest of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2) (1998 & Supp. 2006). These elements must be proved by clear and convincing evidence. Ind. Code § 31-34-12-2 (1998).

### **I. Father**

Father argues that the evidence does not show that the conditions resulting in the children's removal have not been remedied and that the continuation of the parent-child relationships pose a threat to the children's well-being. However, because subsection (b)(2)(B) is written in the disjunctive, the trial court need only find one of the two elements by clear and convincing evidence. Bester, 839 N.E.2d at 148 n. 5.

The trial court's finding that Father poses a threat to I.L. and A.L.'s well being is supported by the evidence. In addition to testimony from service providers regarding Father's continued cocaine use and failure to comply with court-ordered services, the trial court heard testimony that during the therapy sessions Father did attend, he told the children "that they were the problem," which was "extremely upsetting to them." Tr. pp. 49-50. The family therapist also testified that Father said in therapy that A.L. was responsible for her rape, which occurred when she was four years old, because she opened the door to her assailant. This caused A.L. "a lot of ambivalent feelings and a lot of feelings of guilt[.]" Id. p. 59. Finally, I.L. and A.L.'s foster father testified that visits with Father were "traumatic" and left the girls "distracted[.]" Id. p. 11.

Father also contends that evidence is insufficient to show that termination is in the children's best interests. However, the trial court also heard testimony from the family's

therapist, case manager, and the children's CASA that termination was in the children's best interest. Thus, the evidence supports the trial court's decision to terminate Father's parental rights as to I.L. and A.L.

## **II. Mother**

Like Father, Mother contends the DCDFS failed to show by clear and convincing evidence that the conditions resulting in the children's removal have not been remedied, that the continuation of the parent-child relationships poses a threat to the children's well-being, and that termination is in the children's best interests.

A parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests. In re A.L.H., 774 N.E.2d 896, 900 (Ind. Ct. App. 2002), trans. denied. In other words, "[a]lthough parental rights have a constitutional dimension, the law allows for their termination when parties are *unable* or unwilling to meet their responsibility as parents." In re S.P.H., 806 N.E.2d 874, 880 (Ind. Ct. App. 2004) (emphasis added). As the trial court did in its findings, we acknowledge Mother's laudable efforts to maintain a meaningful relationship with her children during her incarceration. Be that as it may, Mother made a tragic choice in 1998 when I.L. was five and A. L. was three. Mother is not due to be released from prison until well after I.L. and A.L. reach adulthood.

Moreover, the purpose of terminating parental rights is not to punish parents but to protect children. In re A.L., 825 N.E.2d 798, 805 (Ind. Ct. App. 2005), trans. denied. The termination of a parent-child relationship is proper where the child's emotional and



physical development is threatened, and a trial court need not wait until the child is irreversibly harmed such that her physical, mental, and social development is permanently impaired before terminating the relationship. In re A.A.C., 682 N.E.2d 542, 544 (Ind. Ct. App. 1997).

I.L. and A.L.’s therapist testified that termination of Mother’s parental rights was necessary in order for A.L. and I.L. “to have an ability to attach to other people and move on in their lives and have stability in their lives....[T]hey need to be able to have some understanding of who they are to move on.” Tr. p. 70. Thus, evidence supports the trial court’s findings that termination is in the children’s best interests. Mother’s request that we determine otherwise is an invitation to reweigh the evidence, which we will not do. See In re J.W., 779 N.E.2d 954, 961 (Ind. Ct. App. 2002), trans. denied.

### **Conclusion**

The trial court’s termination of Father’s and Mother’s parental rights as to I.L. and A.L. is supported by clear and convincing evidence and thus is not clearly erroneous.

Affirmed.

NAJAM, J., concurs.

MAY, J., concurs in result with opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ERIC LUCKHART,	)	
Appellant-Respondent,	)	
	)	
and	)	
	)	
NANETTE LUCKHART,	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 18A05-0604-JV-205
	)	
DELAWARE COUNTY DIVISION OF	)	
FAMILY & CHILDREN,	)	
	)	
Appellee-Petitioner.	)	
	)	

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**MAY, Judge, concurring in result.**

I agree our standard of review requires us to affirm the trial court's orders in this case. I write separately, however, to address a concern in cases involving termination of parental rights of persons who are incarcerated.

The trial court heard testimony that Mother and her children loved each other and were bonded. The majority correctly notes "Mother's laudable efforts to maintain a meaningful relationship," slip op. at 8, with her children. The trial court's record reflects Mother visited with her children almost every other weekend. She participated by telephone in the children's counseling program. She participated in a summer camp with her children and wrote letters to her children on a regular basis. Mother, because of her incarceration, could not have done more. Nevertheless, the fact remains Mother will be

incarcerated until at least 2037, which prohibits her from providing a stable home for her young children before they reach adulthood.

Our decision should not be read, however, to suggest that any incarcerated parent, regardless of how much contact she has with her children, could be subject to termination of her parental rights simply because of her incarceration. That could not have been the intent of the legislature.